

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 15, 2007 Session

RICKY G. AARON v. STATE OF TENNESSEE

**Direct Appeal from the Criminal Court for Davidson County
No. 99-D-2360 Walter C. Kurtz, Judge**

No. M2006-01983-CCA-R3-PC - Filed January 22, 2008

The petitioner, Ricky G. Aaron, was convicted in 2002 of especially aggravated sexual exploitation of a minor and false imprisonment and received an effective sentence of eleven years. State v. Ricky Grover Aaron, No. M2002-02288-CCA-R3-CD, 2004 WL 1533825, at *1 (Tenn. Crim. App. July 8, 2004). This court granted his petition to rehear and subsequently modified his sentence to nine years. State v. Ricky Grover Aaron, No. M2002-02288-CCA-R3-CD, 2004 Tenn. Crim. App. LEXIS 1123, at *3 (Tenn. Crim. App. Dec. 13, 2004), perm. to appeal denied (Tenn. May 2, 2005). In 2005 the petitioner filed a petition for post-conviction relief, alleging a host of constitutional violations. Following a hearing, the post-conviction court vacated the petitioner's conviction for false imprisonment and denied relief on the rest of his claims. On appeal, the petitioner argues that trial counsel was ineffective, that the evidence at his trial was insufficient, and that the post-conviction court erred by not accrediting the petitioner's testimony at the evidentiary hearing. After review, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which JERRY L. SMITH and JOHN EVERETT WILLIAMS, JJ., joined.

Lawrence C. Maxwell and Kristen D. Bailey,¹ Nashville, Tennessee, for the appellant, Ricky G. Aaron.

Robert E. Cooper, Jr., Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Brian K. Holmgren, Assistant District Attorney General, for the appellee, State of Tennessee.

¹The court appreciates the thorough and thoughtful efforts of the petitioner's counsel in this matter.

OPINION

FACTS

The relevant factual background is derived from the opinion of this court in the petitioner's direct appeal from his conviction:

The [petitioner] caught the fourteen-year-old, [victim] shoplifting in the pharmacy where he was the assistant manager. The [petitioner] met with the victim and her mother and agreed to drop any criminal charges if the victim would agree to do some work around the pharmacy for him. The victim visited the pharmacy several times pursuant to this agreement. On one occasion, the [petitioner] called [the victim] over to his car and showed her pornographic pictures of young children. On another occasion he brought [the victim] into the manager's office and locked the door. He asked the victim whether she had ever had sex with an older man and bragged that he had had sex with a fifteen-year-old girl. He made several sexual comments and began to rub the victim's legs. He then brought out a gun and told [the victim] she could not leave until he took some photographs. He removed her clothing and took a picture of her in her underwear. The [petitioner] offered the victim some blue and pink pills which she refused. He then told her to remove her underwear and took another picture with her breasts and genitals exposed. He then threatened to kill her or prosecute her for shoplifting if she told anyone. [The victim] did not return to the pharmacy and did not tell anyone about the pictures at that time. Later, she told her mother about the pictures while hospitalized at the Vanderbilt Psychiatric Hospital. She then spoke with the police at Vanderbilt.

Detective Jeffrey Goodwin of the Davidson County Metropolitan Police went to the [petitioner]'s home where the [petitioner] lived with his girlfriend, Brandy Mayes. Ms. Mayes actually owned the home in question. Detective Goodwin followed Ms. Mayes to Hickory Hollow Mall where he told her that he suspected the [petitioner] of possessing child pornography and asked for permission to search their home when the [petitioner] was not present. Ms. Mayes came up with a plan to get the [petitioner] out of the house and consented in writing to the search. The [petitioner] came home during the search and Detective Goodwin spoke with him. This discussion led to the [petitioner] admitting that he showed pornographic photographs to the victim and that he also took some photographs of the victim. The [petitioner] also mentioned he might have some photographs in his truck. This statement led to a search of his truck where Detective Goodwin found a gun. At some point while searching the house, the police also found pornographic images of children on the [petitioner]'s computer.

....

Following a jury trial, in June of 2002, the [petitioner] was convicted for especially aggravated exploitation of a minor and false imprisonment. The trial court sentenced the [petitioner] on July 8, 2002 to eleven years for the especially aggravated exploitation of a minor, to run consecutive to his federal sentence and a concurrent sentence of eleven months, twenty-nine days for his false imprisonment conviction. The trial court denied the [petitioner]'s motion for a new trial on August 9, 2002. [The petitioner] filed his notice of appeal on September 5, 2002.

Ricky Grover Aaron, 2004 WL 1533825, at *1-2.

After this court affirmed the petitioner's convictions, he filed a petition to rehear in light of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). This court granted the petition and reduced his sentence for the especially aggravated sexual exploitation of a minor conviction from eleven years to nine years. Ricky Grover Aaron, 2004 Tenn. Crim. App. LEXIS 1123, at *3.

In 2005, the petitioner timely filed a petition for post-conviction relief, followed by an amended petition in 2006. His amended petition alleged that his conviction for especially aggravated sexual exploitation of a minor was unconstitutional because no evidence was presented to the jury which would allow it to determine whether the pictures contained "sexual activity" or were "lascivious." He claimed that his legal counsel was constitutionally ineffective in the following ways: (1) failing to adequately investigate facts and introduce evidence that would tend to disprove the victim's version of events; (2) failing to object to testimony which the trial court had previously ruled inadmissible; (3) not seeking a pretrial dismissal or directed verdict at the close of the State's proof on the grounds that the evidence was insufficient to support a conviction for especially aggravated sexual exploitation of a minor; (4) not objecting to hearsay testimony by one of the State's witnesses; (5) not seeking a jury instruction on the lesser-included offense of unlawful photographing; (6) not objecting to the trial court's use of the petitioner's federal conviction for possession of child pornography as a sentencing enhancement; (7) not objecting to the entry of a judgment against the petitioner for false imprisonment, which was time-barred; and (8) advising the petitioner not to testify, even though the trial court had ordered that his federal conviction and the child pornography found on his home computer were inadmissible.

A post-conviction evidentiary hearing was conducted, at which the petitioner was the sole witness. On direct examination, he testified that he informed trial counsel that the State's theory of the offenses was inconsistent with the store's closing procedures. As he explained:

Everyday approximately a half hour prior to the closing time, you start closing down registers. You normally work that through until you get to about five minutes before the closing time and that leaves you with one register open. The closing of the registers, you're verifying money, counting money, it takes two people, normally the closing manager, and whoever ran the register. That was also done in the store manager's office.

As I said in the beginning, I wasn't aware of the theory of how it [the incident leading to his convictions] happened, but when I heard that, that's when I explained to him 30 minutes prior to closing, there's always two people in the manager's office counting money. There was never a time when this could have happened.

The petitioner said he expected trial counsel to test the State's theory at trial by asking Pat Kennedy, a store manager, about the store's closing procedures.

The petitioner and post-conviction counsel then discussed the circumstances leading to the petitioner's decision not to testify:

Q: Now, I believe it is correct that you were advised by your counsel in the middle of the trial not to testify; is that correct?

A: Correct.

Q: And as a result of that advice, did you sign a waiver of your right to testify?

A: Yes, I did.

Q: What advice did you get that prompted you to sign that waiver?

A: The discussion I remember or I would say the main statement that led me to make that decision was if I got on the stand, the State would be able to introduce my federal conviction or the fact that I was a federal prisoner at that time. I can't say that he [trial counsel] specifically used those words, but from what I remember, it was because there was a "no ruling statement" that they couldn't do so.

Q: Why did that concern you? Why did that prompt you to decide to waive your right to testify?

A: If I got on stand [sic] and they were told about a federal conviction, I mean, if I was sitting on the jury, I'd believe the same thing. If you're sitting in a federal prison for having pictures on a computer, and now they're sitting here telling them that you did this same thing, whether it legally makes you guilty or not, any common person is going to assume that you're guilty.

The petitioner said that if he had chosen to testify at trial, he would have explained the store closing procedures to the jury and how the incident with the victim could not have happened as she claimed. On cross-examination, the petitioner acknowledged that he had not testified about the store's closing procedures at any prior proceedings and said he was telling the truth when he told the trial judge that his decision not to testify was his own.

After considering the petitioner's testimony and the arguments advanced by the petitioner and the State, the post-conviction court made the following rulings. The court agreed with the petitioner that his conviction for false imprisonment was barred by the statute of limitations and vacated that conviction. The court rejected the petitioner's arguments that his conviction for especially aggravated sexual exploitation of a minor was unconstitutional and that he received ineffective assistance of counsel at trial.

ANALYSIS

On appeal, the petitioner renews his direct First Amendment-based attack on the sufficiency of the evidence supporting his conviction. He argues that trial counsel was ineffective (1) in not moving for a judgment of acquittal at the close of the State's proof on the grounds that the evidence was constitutionally insufficient to support a conviction for especially aggravated sexual exploitation of a minor; (2) for failing to make a reasonable investigation into evidence that would have discredited prosecution witnesses; (3) in not allowing the petitioner to exercise his right to testify on his own behalf; (4) for failing to object to the use of the petitioner's federal conviction as an enhancement factor for sentencing; (5) for failing to appropriately respond to the introduction of testimony previously held inadmissible by the trial court; (6) for failing to object to hearsay testimony; and (7) in withdrawing a request for a jury instruction on unlawful photographing. He also asserts that the post-conviction court erred in rejecting his testimony at the evidentiary hearing. The State responds that the petitioner's direct attack on his conviction should not be reviewed because it has previously been adjudicated, the post-conviction court was correct in dismissing the petitioner's claims of ineffective assistance, and the court did not err in rejecting the petitioner's testimony because it was controverted by the State on cross-examination.

I. Post-Conviction Relief

Post-conviction relief "shall be granted when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103 (2006). The petitioner bears the burden of proving factual allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f) (2006). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. See Wiley v. State, 183 S.W.3d 317, 325 (Tenn. 2006). When reviewing factual issues, the appellate court will not reweigh the evidence and will instead defer to the trial court's findings as to the credibility of witnesses or the weight of their testimony. Id. However, review of a trial court's application of the law to the facts of the case is *de novo*, with no presumption of correctness. See Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998). The issues of deficient performance of counsel and possible prejudice to the defense are mixed questions of law and fact and, thus, subject to *de novo* review by the appellate court. See Wiley, 183 S.W.3d at 325; State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999).

II. Sufficiency of the Evidence

The petitioner contends that his conviction must be reversed because it was not supported by sufficient evidence, in violation of his rights under the Constitutions of the United States and the State of Tennessee. The State counters that the post-conviction court should not have considered the petitioner's direct attack upon the sufficiency of the evidence supporting his conviction because the issue had been previously determined.

At the time the petitioner's crimes were committed, Tennessee Code Annotated section 39-17-1005(a) provided: "It is unlawful for a person to knowingly promote, employ, use, assist, transport or permit a minor to participate in the performance or in the production of material which includes the minor engaging in: (1) [s]exual activity; or (2) [s]imulated sexual activity that is patently offensive." The petitioner argues that the production of "material" is an essential element of this offense. See VanArsdall v. State, 919 S.W.2d 626, 631 (Tenn. Crim. App. 1995). Because no "material" was ever shown or described to the jury, the petitioner contends that the State did not establish each element of the offense. According to the petitioner, the State's proof at trial was deficient because the photographs were not in evidence:

[N]one of the subject photographs allegedly taken by [the petitioner] were ever produced at trial. No photographs depicting sexual activity were ever seen by [the victim] or by anyone else, least of all the jury; thus, no one at trial could describe what, if anything, was depicted on the photographs.

As we will explain, we agree with the State that this issue has been previously determined. Tennessee Code Annotated section 40-30-106, dealing with post-conviction procedure, provides in part:

(f) Upon receipt of a petition in proper form, or upon receipt of an amended petition, the court shall examine the allegations of fact in the petition. If the facts alleged, taken as true, fail to show that the petitioner is entitled to relief or fail to show that the claims for relief have not been waived or previously determined, the petition shall be dismissed. The order of dismissal shall set forth the court's conclusions of law.

. . . .

(h) A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence.

Tenn. Code Ann. § 40-30-106(f), (h) (2006).

This court evaluated the sufficiency of the evidence supporting the petitioner's conviction on direct appeal and concluded that it was sufficient to sustain the conviction:

The jury obviously credited the testimony of [the victim] as to whether the [petitioner] made a photograph of her, and therefore, was guilty of especially aggravated sexual exploitation of a minor. [The victim] testified that when the [petitioner] locked her in the manager's office he forced her to take her clothes off and made a photograph of her displaying her breasts and her genitals. Although the photographs were never found, it is the jury's province to judge the credibility of witnesses. We are not to second-guess the jury on credibility issues. Therefore, we conclude there is sufficient evidence to find the [petitioner] guilty of especially aggravated sexual exploitation of a minor.

Ricky Grover Aaron, 2004 WL 1533825, at *12.

The petitioner responds that the present sufficiency challenge is different from that raised and determined on direct appeal, because this challenge is based upon constitutional free speech principles. Be that as it may, "the sufficiency of the convicting evidence is not cognizable in a post-conviction proceeding." Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). This assignment is without merit.

III. Ineffective Assistance of Counsel

The petitioner next claims that he is entitled to relief because he received ineffective assistance of counsel at trial. Previously, we have set out his specific claims.

The right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee. See U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In order to determine the competence of counsel, Tennessee courts have applied standards developed in federal case law. See State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that the same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The United States Supreme Court articulated the standard in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), which is widely accepted as the appropriate standard for all claims of a convicted petitioner that counsel's assistance was defective. The standard is firmly grounded in the belief that counsel plays a role that is "critical to the ability of the adversarial system to produce just results." Id. at 685, 104 S. Ct. at 2063. The Strickland standard is a two-prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the

defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 104 S. Ct. at 2064. The Strickland Court further explained the meaning of "deficient performance" in the first prong of the test in the following way:

In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

Id. at 688-89, 104 S. Ct. at 2065. The petitioner must establish "that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms." House v. State, 44 S.W.3d 508, 515 (Tenn. 2001) (citing Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996)).

As for the prejudice prong of the test, the Strickland Court stated: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S. Ct. at 2068; see also Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994) (concluding that petitioner failed to establish that "there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different").

The reviewing court must indulge a strong presumption that the conduct of counsel falls within the range of reasonable professional assistance, see Strickland, 466 U.S. at 690, 104 S. Ct. at 2066, and may not second-guess the tactical and strategic choices made by trial counsel unless those choices were uninformed because of inadequate preparation. See Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). The fact that a strategy or tactic failed or hurt the defense does not alone support the claim of ineffective assistance of counsel. See Thompson v. State, 958 S.W.2d 156, 165 (Tenn. Crim. App. 1997). Finally, a person charged with a criminal offense is not entitled to perfect representation. See Denton v. State, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). As explained in Burns, 6 S.W.3d at 462, "[c]onduct that is unreasonable under the facts of one case may be perfectly reasonable under the facts of another."

A. Motion for Judgment of Acquittal

The petitioner indirectly attacks the sufficiency of the evidence supporting his conviction by asserting that trial counsel was ineffective in failing to move for a judgment of acquittal based on insufficiency of the evidence. He analogizes to Rhoden v. Morgan, 863 F. Supp. 612 (M.D. Tenn. 1994), in making this argument. There, the defendant was convicted of "using a minor 'to engage in posing or modeling in performance of sexual conduct to-wit, exhibition of the female genitals for the purpose of preparing photographs which were obscene in violation of Section 39-6-1137

Tennessee Code Annotated.”” Rhoden, 863 F. Supp. at 616. The allegedly obscene photographs were never presented to the trier of fact. Id. The defendant filed a habeas corpus petition in federal court, and the United States District Court for the Middle District of Tennessee held that Tennessee Code Annotated section 39-6-1137 was unconstitutional as applied to the defendant, reasoning that the standard for regulating obscenity set forth by the Supreme Court in Miller v. California,² 413 U.S. 15, 93 S. Ct. 2607 (1973), requires “that the trier of fact view the allegedly objectionable material in order to determine whether it is obscene.” Rhoden, 863 F. Supp. at 617. Because the allegedly objectionable photographs in his case were never introduced into evidence, the petitioner argues that constitutionally he could not be convicted of especially aggravated sexual exploitation of a minor, and trial counsel was ineffective for failing to raise that argument.

In addressing this attack on the petitioner’s conviction, the post-conviction court found the holding in Rhoden to be inapplicable:

The petitioner makes two (2) related arguments in challenging the constitutionality of the conviction relying on Rhoden v. Morgan, 863 F. Supp. 612 (M.D. Tenn. 1994) to support his argument. In Rhoden, the defendant was convicted of use of a minor for obscene purposes under now repealed T.C.A. § 39-6-1137 (1985). The conviction was based upon allegations that the defendant took obscene photographs that depicted the lewd exhibition of the genitals of a minor. Rhoden[,] 863 F. Supp. at 617. No photographs were ever introduced at trial, however. Instead, the only evidence presented was testimony from the victim that she had been photographed by the defendant in various stages of semi-nudity and certain admissions by the defendant. Id. In holding the statute unconstitutional as applied, the District Court ruled that it is a requirement that “the trier of fact view the allegedly objectionable material in order to determine whether it is obscene.” Id. . . . The court held, moreover, that trial counsel was ineffective in that he failed to move for a dismissal of the charge at the close of the state’s proof “[d]espite the astonishing lack of proof offered to convict” the defendant. Id. at 621.

The petitioner argues that under both the First Amendment to the United States Constitution and under Article I, Section 19 of the Tennessee Constitution, speech may not be prohibited by a statute that is overly broad. “The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.” Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002). The statute under which petitioner was convicted for Especially Aggravated Sexual Exploitation of a Minor was applied to petitioner in a way that was overbroad in that the jury was allowed to convict him of taking photographs that supposedly contained “sexual activity,” without having

² States may regulate materials “which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” Miller, 413 U.S. at 24, 93 S. Ct. at 2615.

viewed any of the photographs for themselves, thus presenting the danger that protected photographic depictions were prohibited.

The problem with the position taken by the petitioner is that the Rhoden case involved a statute prohibiting obscene acts and the case then, in turn, involved constitutional standards related to obscenity. The statute at issue here, T.C.A. § 39-17-1005, is a statute that relates to the protection of children and the sexual exploitation of children. The petitioner places great reliance on the fact that the photographs were never found and never seen by the jury. But, what the statute prohibits is not only the “production of material” involving lascivious exhibition but the “performance” which includes a minor engaging in lascivious activities. The Rhoden court itself recognized the difference between standards related to obscenity and child pornography and also acknowledged that under certain circumstances when the facts are sufficiently clear that a defendant can be convicted of taking pornographic photos of children even absent the production of the photographs at trial. See Rhoden, 863 F. Supp. at 618-620.

Given the holding of the Court of Criminal Appeals that there was sufficient evidence to support a conviction for especially aggravated sexual exploitation of a minor, and given the explicit testimony of the victim, and the scope of the statute in question, the Court finds no constitutional impediment to the petitioner’s conviction for especially aggravated sexual exploitation of a minor.

The record supports the determination of the post-conviction court that trial counsel was not ineffective in not raising the Rhoden argument because that case does not control our interpretation of Tennessee Code Annotated section 39-17-1005. In fact, it is not persuasive authority because the court in that case was construing a statute regulating obscenity, whereas we are construing a statute whose primary purpose is the protection of children. The difference is not one of mere semantics. States may place greater restrictions on child pornography than on other forms of sexually explicit materials.³ New York v. Ferber, 458 U.S. 747, 756, 102 S. Ct. 3348, 3354 (1982). “The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.” Id. at 757, 102 S. Ct. at 3355. Even if, as the petitioner argues, the statute at issue in Rhoden and Tennessee Code Annotated section 39-17-1005 employ “undeniably similar language,” it is significant that the text of section 39-17-1005, unlike the statute in Rhoden, does not refer to obscenity in any way. This indicates that the legislature, in drafting section 39-17-1005, intended to regulate not obscene materials but only those materials whose production involves the exploitation and abuse of minors. Hence, the constitutional limitations on the regulation of obscenity are inapplicable to section 39-17-1005.

³ See Ferber, 458 U.S. at 764, 102 S. Ct. at 3358: “The Miller [v. California] obscenity formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole.”

As the post-conviction court stated: “The Rhoden court itself recognized the difference between standards related to obscenity and child pornography and also acknowledged that under certain circumstances when the facts are sufficiently clear that a defendant can be convicted of taking pornographic photos of children even absent the production of the photographs at trial.” We agree with this determination of the post-conviction court. The petitioner’s defense was not prejudiced by the fact that trial counsel did not challenge the as-applied constitutionality of Tennessee Code Annotated section 39-17-1005.

B. Reasonable Investigation

The petitioner also alleges that trial counsel should have investigated more extensively evidence that, in his view, could have discredited the State’s witnesses. He contends that trial counsel should have questioned Pat Kennedy about the drug store’s closing procedures, which required multiple employees to be in the manager’s office at the time the photographs of the victim were taken. This would tend to discredit the testimony of the victim that she and the defendant were alone when the pictures were taken. The State argues that the post-conviction court correctly denied this claim because the petitioner did not call Kennedy to testify at the post-conviction evidentiary hearing. As we will explain, we agree with the State.

To satisfy the prejudice requirement of Strickland, when alleging that counsel was ineffective for failing to offer testimony from a favorable witness, the post-conviction petitioner must “(1) produce the witness at his post-conviction hearing; (2) show that through reasonable investigation, trial counsel could have located the witness; and (3) elicit both favorable and material testimony from the witness.” Denton v. State, 945 S.W.2d 793, 802-03 (Tenn. Crim. App. 1996) (citing Black, 794 S.W.2d at 757). The reasons for this requirement are apparent:

It is elementary that neither a trial judge nor an appellate court can speculate or guess on the question of whether further investigation would have revealed a material witness or what a witness's testimony might have been if introduced by defense counsel. The same is true regarding the failure to call a known witness. In short, if a petitioner is able to establish that defense counsel was deficient in the investigation of the facts or calling a known witness, the petitioner is not entitled to relief from his conviction on this ground unless he can produce a material witness who (a) could have been found by a reasonable investigation and (b) would have testified favorably in support of his defense if called. Otherwise, the petitioner fails to establish the prejudice requirement mandated by Strickland v. Washington.

Black, 794 S.W.2d at 757-58 (footnote omitted).

The petitioner seeks to distinguish Denton and Black from his own appeal by reading them extremely narrowly. He argues that Denton’s holding should be restricted to cases where trial counsel failed to produce a witness at trial. We note that the petitioner’s trial counsel did call Kennedy but did not ask about the store’s closing procedures. The petitioner argues that Black is

inapplicable because it turns on the impropriety of trial and appellate judges speculating as to what the testimony of the uncalled witness would have been. He argues that in his case, the post-conviction court did not have to engage in such conjecture because the petitioner himself testified to the closing procedures and Mr. Kennedy's knowledge thereof.

We read Denton and Black more broadly than does the petitioner. Denton's holding is premised on the fact that if the allegedly favorable defense testimony does not appear in the trial record or the record of the post-conviction evidentiary hearing, a court is unable to evaluate that testimony and determine whether the defendant was prejudiced by the failure to properly introduce the testimony at trial. Thus, it is irrelevant whether trial counsel failed to call a known witness, or merely neglected to ask the right questions of a called witness. Unless the post-conviction petitioner introduces at the evidentiary hearing the testimony of the allegedly favorable witness, a reviewing court cannot conclude that the petitioner's defense was prejudiced by the fact that this evidence was not presented at trial.

Likewise, we disagree with the petitioner's view of the holding in Black. He would have us hold that Black's requirement that the testimony of the allegedly favorable witness be introduced at the evidentiary hearing may be satisfied by having another person testify about the knowledge of the absent witness. It is axiomatic that a witness may testify only to matters within his or her *personal* knowledge. See Tenn. R. Evid. 602. Black's holding is unequivocal: the allegedly favorable witness must be called and must offer favorable testimony at the evidentiary hearing in order for the petitioner to demonstrate prejudice. The record supports the determination of the post-conviction court that this claim is without merit.

C. Advising the Petitioner Not to Testify

The petitioner argues that trial counsel's decision not to allow him to testify on his own behalf was unreasonable. He acknowledges that he signed a written waiver of his right to testify but contends that this waiver was not knowing, voluntary, or intelligent. He argues that "[t]here was no reason for [him] not to testify on his own behalf" because the trial court had ruled that his federal conviction for possession of child pornography could not be introduced by the State. The State responds that the petitioner's written waiver of his right to testify should control.

At a pretrial motion hearing, the trial court ruled that evidence pertaining to the images of child pornography found on the petitioner's home computer could not be introduced at trial. The court also explained that it could reevaluate its ruling if the defendant chose to testify at trial:

Well, I think both of these [defense] motions [in limine to exclude evidence of the child pornography and drugs in the petitioner's possession] should be granted. For one thing, on the side of the child pornography, I think if this evidence went in that, you know, the [probative] value is outweighed by the danger of unfair prejudice. Given the fact that this is [Tennessee Rule of Evidence] 404 B evidence and collateral to the indicted charge, I think this would be the very kind of situation that

404 B 3 is intended to exclude, because I think it would overwhelm, totally overwhelm, the charges at issue here.

....

Also the other thing is the [petitioner] here could open the door to either one of these categories of evidence depending upon how he testifies. And I know you're aware of that possibility, [trial counsel], but, you know, it would be a distinct possibility here if he didn't walk a fine line. If he overstated something, I could certainly reassess whether this was admissible or not or some of this was admissible.

The petitioner later testified at the post-conviction evidentiary hearing on his decision not to take the stand at trial:

Q: What advice did you get that prompted you to sign that waiver [of your right to testify]?

A: The discussion I remember or I would say the main statement that led me to make that decision was if I got on the stand, the State would be able to introduce my federal conviction or the fact that I was a federal prisoner at that time. I can't say that he specifically used those words, but from what I remember, it was because there was a "no ruling statement" that they couldn't do so.

Q: Why did that concern you? Why did that prompt you to decide to waive your right to testify?

A: If I got on stand and they were told about a federal conviction, I mean, if I was sitting on the jury, I'd believe the same thing. If you're sitting in a federal prison for having pictures on a computer, and now they're sitting here telling them that you did this same thing, whether it legally makes you guilty or not, any common person is going to assume that you're guilty.

A criminal defendant has a constitutional right to testify at trial. See U.S. Const. amends. V, XIV; Tenn. Const. art. I, § 9; Momon v. State, 18 S.W.3d 152, 157 (Tenn. 1999). This right is fundamental and may only be waived personally, by the defendant. Id. at 161. In every criminal trial where the defendant does not testify, defense counsel must demonstrate, either by submitting a written waiver or establishing in an *in camera* hearing, that the defendant understands:

(1) the defendant has the right not to testify, and if the defendant does not testify, then the jury (or court) may not draw any inferences from the defendant's failure to testify;

(2) the defendant has the right to testify and that if the defendant wishes to exercise that right, no one can prevent the defendant from testifying;

(3) the defendant has consulted with his or her counsel in making the decision whether or not to testify; that the defendant has been advised of the advantages and disadvantages of testifying; and that the defendant has voluntarily and personally waived the right to testify.

Id. at 162.

The post-conviction court called the petitioner's argument that trial counsel improperly advised him not to testify "difficult to comprehend as the record indicates that the petitioner submitted a written Momon waiver to the Court related to his right to testify." The court did not credit the petitioner's testimony at the evidentiary hearing because it was inconsistent with his written waiver, and the petitioner had heard the trial court rule that his federal conviction was inadmissible for impeachment should he testify. We conclude that the record supports the determination by the post-conviction court that the petitioner knowingly, voluntarily, and intelligently waived his right to testify. Accordingly, this claim is without merit.

D. Use of the Petitioner's Prior Conviction in Sentencing Enhancement

The petitioner claims trial counsel should have objected to the use of his prior federal conviction as a sentencing enhancement factor. The offense for which the petitioner was convicted in this case took place in April 1998, and his federal conviction occurred in February 2002. He argues that a "prior conviction" for sentencing purposes includes only convictions adjudicated prior to the commission of the offense for which the defendant is being prosecuted. See State v. Blouvet, 904 S.W.2d 111, 112 (Tenn. 1995). Thus, he asserts that the trial court and this court erred when they used the federal conviction to enhance his sentence for especially aggravated sexual exploitation of a minor from the minimum eight years up to nine years. By his view, it would follow that trial counsel erred in not raising this issue at trial or on direct appeal. The State responds that the post-conviction court's holding is correct that the petitioner's federal conviction was properly used to enhance his sentence. We will review this claim.

Tennessee Code Annotated section 40-35-114 (2006) provides, in part: "If appropriate for the offense and if not already an essential element of the offense, the court shall consider, but is not bound by, the following advisory factor in determining whether to enhance a defendant's sentence: (1) [t]he defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range." We note that the phrase "previous history of criminal convictions or criminal behavior" is not further defined. The petitioner asks us to construe that phrase synonymously with the phrase "prior conviction" as used in Tennessee Code Annotated sections 40-35-106 through 40-35-108, which define the term "prior conviction" as "a conviction for an offense occurring prior to the commission of the offense for which the defendant is being sentenced."

We conclude that the phrase "previous history of criminal convictions or criminal behavior" must be construed more broadly than the phrase "prior conviction." The disjunctive phrase indicates

that the legislature intended that a wider range of conduct, including some not resulting in a conviction, be considered when deciding whether to enhance a defendant's sentence. It is instructive that the legislature did not employ the term "prior conviction" in Tennessee Code Annotated 40-35-114(1). If it had intended to restrict the use of prior convictions as enhancement factors to those "occurring prior to the commission of the offense for which the defendant is being sentenced," the legislature could simply have used the words "prior conviction." The use of different language suggests that a different construction is appropriate.

As the post-conviction court explained in denying this claim:

The petitioner . . . contends that this Court's consideration in sentencing of his prior federal conviction is not authorized by the sentencing statute. See T.C.A. § 40-35-114.

The petitioner is confused by the statutes and case law related to the sentencing ranges. It is true that in determining the sentencing range, prior conviction means a conviction for an offense occurring prior to the commission of the offense. However, as relates to sentencing within the range, the statute T.C.A. § 40-35-114 clearly allows the Court to consider any conviction prior to the sentencing hearing. Furthermore, the Court of Criminal Appeals held in its December 13, 2004 decision, which reduced the sentence from eleven (11) to nine (9) years, that the trial court had appropriately considered the petitioner's prior federal conviction.

The record supports this determination.

E. Prohibited Testimony

During his trial testimony, Detective Jeffrey Goodwin of the Metropolitan Nashville Police Department referred to the child pornography found on the petitioner's home computer, contrary to the trial court's earlier ruling that such evidence could not be presented to the jury. When this reference was made, the trial court halted the proceedings and conducted a jury-out bench conference, parts of which were inaudible to the court reporter. Trial counsel did not object on the record, seek a mistrial or curative instruction, or ensure that the court reporter transcribed the entire bench conference. The petitioner characterizes this conduct as ineffective assistance; the State counters that this court has previously determined that the petitioner was not prejudiced by the introduction of this testimony.

On this issue, the post-conviction court relied on the holding of this court on direct appeal that the petitioner was not prejudiced by Detective Goodwin's reference to child pornography on the petitioner's home computer. See Ricky Grover Aaron, 2004 WL 1533825, at *15-17. On direct appeal, this court held that the petitioner did not establish prejudice because the jury was not told of the number of illicit images on the petitioner's computer, the petitioner's federal conviction for

possession of child pornography was not mentioned, and the victim had previously told the jury that the petitioner possessed such images. Id. at *17. It follows that, if the petitioner was not prejudiced by the introduction of this testimony, he was not prejudiced by trial counsel's failure to object to such testimony. The record supports this determination of the post-conviction court.

F. Hearsay Testimony

The petitioner also asserts on appeal that trial counsel should have objected to certain other statements made by Detective Goodwin at trial:

Starting at page 265 of the trial transcript, defense counsel for [the petitioner] conducted a cross examination of Detective Goodwin regarding certain statements [the victim] had made to him in order to establish when the events allegedly occurred and to point out that her testimony about the presence of a gun in the manager's office was different from what she had told the detective. Then, on redirect examination of Detective Goodwin, starting at page 274 of the trial transcript, the Assistant District Attorney asked a series of questions about other subjects on which [the victim] had made statements to the detective. The things that were asked on redirect were not proper subjects for redirect, because they were not asked about on cross examination. More importantly, the questions called for hearsay testimony from Detective Goodwin, and defense counsel did not make any objections to them.

The State replies that the post-conviction court's holding was correct that the statements were properly admitted as prior consistent statements introduced to rebut impeaching statements.

In addressing this issue, the post-conviction court said:

The testimony related to the victim's statement begins with defense counsel cross-examining the detective related to inconsistent prior statements made by the victim. This of course was entirely proper. The petitioner's complaint is that on redirect additional statements of the victim were put into evidence. The Court's opinion is, however, that these statements were appropriate to counter the cross-examination of defense counsel. Prior consistent statements are admissible in order to rebut impeaching statements. . . . Furthermore, the admitted statements were redundant to the victim's testimony and did not deprive the petitioner of a fair trial.

Initially, we note that the petitioner has not outlined with specificity which statements allegedly violated the hearsay rule. To the extent that the petitioner attacks generally Detective Goodwin's testimony about the victim's statements, we agree with the post-conviction court's holding that the statements were admissible into evidence. As this court has held, although prior consistent statements of a witness are generally inadmissible for the purpose of bolstering credibility, "prior consistent statements may be admissible . . . to rehabilitate a witness when insinuations of recent fabrication have been made, or when deliberate falsehood has been implied." State v. Hodge,

989 S.W.2d 717, 725 (Tenn. Crim. App. 1998) (quoting State v. Benton, 759 S.W.2d 427, 433 (Tenn. Crim. App. 1988)). The petitioner acknowledges that he attacked the victim's credibility on cross-examination. This opened the door to the introduction of Detective Goodwin's testimony regarding prior consistent statements made to him by the victim.

The petitioner also challenges these statements as exceeding the proper scope of redirect examination. "The admissibility of testimony and other evidence as well as the scope of redirect examination is within the sound discretion of the trial court, which will not be reversed absent an abuse of that discretion." State v. Barnard, 899 S.W.2d 617, 624 (Tenn. Crim. App. 1994) (citation omitted). The trial court was within its discretion in admitting the prior consistent statements of the victim to rebut implications of fabrication elicited on cross-examination. Accordingly, we conclude that the record supports the determination of the post-conviction court that trial counsel was not ineffective in not arguing at trial that the statements exceeded the scope of redirect examination.

G. Jury Instruction on Lesser-Included Offense

Finally, the petitioner claims trial counsel should not have withdrawn a request for a jury instruction on the offense of unlawful photographing in violation of privacy, which he asserts is a lesser-included offense of especially aggravated sexual exploitation of a minor. See Tenn. Code Ann. § 39-13-605 (2006). The State urges affirmance of the trial court's holding that unlawful photographing is not a lesser-included offense of especially aggravated sexual exploitation of a minor.

Tennessee Code Annotated section 39-13-605 provides in part,

(a) It is an offense for a person to knowingly photograph, or cause to be photographed an individual, when the individual is in a place where there is a reasonable expectation of privacy, without the prior effective consent of the individual, or in the case of a minor, without the prior effective consent of the minor's parent or guardian, if the photograph:

(1) Would offend or embarrass an ordinary person if such person appeared in the photograph; and

(2) Was taken for the purpose of sexual arousal or gratification of the defendant.

....

(d)(1) A violation of this section is a Class A misdemeanor.

The petitioner argued in his petition for post-conviction relief that his conviction for false imprisonment, a misdemeanor lesser-included offense of especially aggravated kidnapping, must be vacated because the one-year limitations period for misdemeanors had expired before the petitioner

was indicted. See Tenn. Code Ann. § 40-2-102(a) (2006). The post-conviction court agreed and vacated the conviction. The petitioner also argues that trial counsel was ineffective in withdrawing its request for a jury instruction on unlawful photographing in violation of privacy, a Class A misdemeanor. For precisely the same reason that it was reversible error to instruct on and convict the petitioner of false imprisonment, it would have been reversible error for the trial court to instruct the jury on unlawful photographing in violation of privacy. This assignment is without merit.

IV. Refusal to Credit the Petitioner's Testimony

The petitioner claims that the post-conviction court, in ruling on several of his claims of ineffective assistance, improperly rejected his testimony at the evidentiary hearing. He argues that, because he was the only witness at the hearing, his testimony must be credited. For support, he relies on Ray Carter, Inc. v. Edwards, 222 Tenn. 465, 470, 436 S.W.2d 864, 866 (1969), where the Tennessee Supreme Court held that “[t]he testimony of a party to the cause may not be disregarded where there is no contradiction or impeachment, either direct or circumstantial, and such testimony is unequivocal.” The petitioner contends that because his testimony was the only evidence presented at the evidentiary hearing, the post-conviction court could not disregard as incredible his testimony about Patrick Kennedy’s knowledge of the drug store’s closing procedures and trial counsel’s advice about the admissibility of his federal conviction. The State responds that the petitioner’s testimony was adequately refuted by the State’s cross-examination and the trial court record.

We agree with the State that its cross-examination of the petitioner at the evidentiary hearing was sufficient to “contradict or impeach” the petitioner within the meaning of Ray Carter, Inc. and that the post-conviction court had the authority to make a credibility determination regarding such testimony. During the hearing, the State examined the petitioner about his decision not to testify:

Q: Did your counsel ever advise you that if you testify in connection with this case that notwithstanding the fact that the Judge had ruled the evidence of your possession of all of this child pornography [inadmissible] that you might open the door to that by the manner in which you testified?

A: He didn’t say it in that way. As I recall, he said the subject of a federal conviction would come out and be used against me. Either he or [associate trial counsel], I’m not going to say specifically which one said that.

Q: You made the decision yourself not to testify, correct?

A: Yes, I did.

....

Q: When the Judge asked you if you understood your rights to testify and you said yes and decided not to do that on advice of counsel and after thinking about it and it was your on [sic] decision, were you telling the truth then?

A: Absolutely.

Q: Now, you're claiming; however, that you[r] attorney rendered you unprofessional conduct in giving you that information?

A: If I was told that they would bring out the federal conviction and the statements made by the Judge were ruled saying they could not, that was the impression I was given. The impression as I remember, the Judge did not rule favorably for me. Now, they didn't use that word, but that was my understanding.

These questions cast doubt on the petitioner's claim that trial counsel misinformed him about the admissibility of his federal conviction, and the post-conviction court was within its discretion to make a credibility determination on this issue. The State did not cross-examine the petitioner about Mr. Kennedy's knowledge of the store's closing procedures; but, as previously explained, such testimony was outside the scope of the petitioner's personal knowledge and therefore could not be credited by the court.

CONCLUSION

Based upon the foregoing authorities and reasoning, the judgment of the post-conviction court is affirmed.

ALAN E. GLENN, JUDGE